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September 20, 2004

**DEPARTMENT OF ENERGY**
**OFFICE OF HEARINGS AND APPEALS**

***Appeal***

**Name of Case:** **Worker Appeal**

**Date of Filing:** **June 10, 2004**

**Case No.:** **TIA-0110**

**XXXXXXXXXXXXXX (the applicant or the worker) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the worker's illness was not related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.**

## *I. Background*

### A. The Energy Employees Occupational Illness Compensation Program Act

**The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act or EEOICPA) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act provides for two programs.**

**The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. As relevant to this case, the illnesses include specified cancers associated with radiation exposure. 42 U.S.C. § 73411(9).**

**The DOE administers the second program, which does not itself provide any monetary benefits. Instead, it is intended to aid DOE contractor employees in obtaining workers' compensation benefits**

under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). As the foregoing indicates, the DOE program itself does not provide any monetary or medical benefits.

To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program.2/

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request that the DOE's Office of Hearings and Appeals review certain OWA decisions. An applicant may appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal is filed pursuant to that Section. Specifically, the applicant seeks review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

B. Factual Background

The record in this case indicates that from 1955 through 1968, the worker was a chemical operator at the DOE's Portsmouth Gaseous Diffusion plant in Piketon, Ohio. According to the applicant, this job involved working with plant spills involving toxic substances. He claims that he developed colon cancer as a result of exposure to uranium at the work site.

The Physician Panel rendered a negative determination on this claim. The Panel unanimously found that the worker's illness did not arise "out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility." The Panel based this conclusion on the standard of whether it believed that "it was

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2/ *See* www.eh.doe.gov/advocacy.

at least as likely as not that exposure to a toxic substance at a DOE facility during the course of the worker's employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the worker's illness or death."

In considering the claim, the Panel found that the worker had colon cancer. The Panel recognized that the worker was exposed to uranium, but found that his colon cancer was not related to the exposure. The Panel therefore issued a negative determination with respect to this application.

The OWA accepted the Physician Panel's determination. *See* OWA May 13, 2004 Letter. The applicant filed the instant appeal.

## II. *Analysis*

In his appeal, the applicant argues that the Panel erred (i) in its consideration of his exposure to uranium; (ii) in its application of the standard of proof; (iii) in its consideration of other causes of colon cancer; and (iv) in its failure to give due recognition to the compensation he received for his illness from the DOL. He also claims that the copy of the Panel report that he received was incomplete.

### A. Uranium Exposure

In the appeal, the applicant argues that the Panel did not give full consideration to his entire exposure to uranium. He points to a statement in the Panel determination noting that in 1965 he was exposed to levels of uranium that were above plant limits. He argues that the record indicates that he was exposed to even higher levels of uranium in other years, pointing out that his combined exposures were great enough to exclude him from the workplace for several periods of time. He believes that if the Panel had considered the full level of his uranium exposure over his entire DOE work history, it would have reached a different conclusion about whether his colon cancer was related to his uranium exposure.

After reviewing the record, I see no Panel error. Given that the applicant's total radiation exposure was part of the record in this case, I have no reason to believe that the Panel did not review it and give it appropriate consideration. *E.g.,* Record at 268. In fact, the Panel's report clearly states that it reviewed his "total radiation exposure," and found it "unremarkable." This means that the Panel simply did not consider the overall level of radiation exposure to be significant here. The applicant has not shown any

basis for concluding that this determination is incorrect, or for believing that the Panel did not actually review the entire record. I therefore find no basis for any further Panel review on the issue of the level of radiation exposure.

B. Standard of Proof

The applicant argues that the Panel applied an incorrect standard in considering whether his colon cancer was related to a toxic exposure at the workplace. He notes that the Panel's discussion of the "key factors" entering into its determination states, "it is not likely that his colon cancer was caused, contributed or aggravated by a toxic exposure while working at a DOE facility." The applicant points out that the standard in these cases is whether "it is at least as likely as not" that the toxic exposure was a significant factor in aggravating, contributing to or causing the worker's illness or death. The applicant asserts that this standard may be met if there is only a 50-50 chance that the toxic exposure was a significant factor.

The applicant is correct in his characterization of the standard. However, I am not persuaded that the Panel applied the standard erroneously. As noted above, the Panel responded to the following question in the negative: "Did this illness [colon cancer] arise 'out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility based on whether it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of the worker's employment by a DOE contractor was [a] significant factor in aggravating, contributing to, or causing the worker's illness or death?'" This is the correct enunciation of the standard and I therefore have no doubt that the Panel applied it correctly here. I do not think that the fact that the Panel's "key factors" narrative did not precisely track this language means that it did not apply the standard correctly. Rather, I believe that the Panel unartfully rephrased its conclusion in the "key factors" section of its determination. Indeed, the panel's characterization of the applicant's exposure as "unremarkable" indicates that the panel did not view the exposure as significant, let alone a significant factor in the applicant's case. I therefore find no Panel error with respect to the standard of proof that it applied.

C. Other Causes of Colon Cancer

In its report, the Panel referred to other factors that may cause colon cancer, such as diet, heredity, and inflammatory bowel

disease. The Panel noted that the latter two causes did not seem to be issues here, but stated that the individual was "moderately obese, drank a lot of coke, and had adult onset diabetes. Presumably he had a standard, American diet, which increases the risk of colon cancer."

The applicant generally objects to these assertions, as either untrue or as not precluding that his uranium exposure could have contributed to his colon cancer. The applicant points to the relatively young age (53) at which he developed colon cancer and asserts that even if he were predisposed to the disease, the early diagnosis "would tend to indicate that it was at least as likely as not that the exposure was a significant factor in aggravation or contribution to the illness in the form of acceleration of the onset."

Again, I see no basis for further Panel review. The Panel did not determine that his colon cancer was caused by his eating habits or obesity. It just pointed out that these are risk factors for colon cancer. Secondly, as discussed above, the Panel's decision was based on its determination that the applicant's colon cancer was not caused, aggravated, or contributed to by exposure to uranium. There is thus no need to revisit this issue in light of the applicant's dietary habits. Finally, there is no support in the record for the applicant's assertion that the allegedly early onset of his cancer bears any relationship whatsoever to exposure to a toxic substance at the DOE work site.

D. DOL Compensation

The applicant points out that he received $150,000 under the DOL program discussed above, awarding compensation under the EEOICPA to certain uranium workers who developed cancer. He argues that this means that there is a legislative recognition that radiation was a significant factor in his illness.

I cannot agree. The causation standard in Section 852.8 and the causation standard applied by DOL for benefits determinations under the EEOICPA are different. Accordingly, this difference in causation standards may produce inconsistent causation determinations from the DOE and the DOL with respect to workers who file applications in both the DOE and DOL programs. However, the DOE has determined that nothing in the Act required that the same causation standard be used for the two programs. 67 Fed. Reg. 52847 (August 14, 2002). The DOE physician panel must meet a higher standard. 10 C.F.R. § 852.8. *See also, Worker Appeal* (Case No.

**TIA-0078), 29 DOE ¶ 80,131, 80,559 n.3 (2004). Therefore, the inconsistent results from the DOE and the DOL do not establish any basis for further Panel review.**

**E. Incomplete Panel Report**

**The applicant claims that he did not receive a complete copy of the Panel's report. After reviewing his copy, we noted that it excluded the question regarding whether the Panel's determination was unanimous. At our request, the OWA sent us a copy of the Panel report which includes this question and the Panel's response. That copy indicates that the Panel's negative determination was indeed unanimous. A copy of the report showing the Panel's response to the question accompanies this determination.**

## III. *Conclusion*

**In sum, the applicant has not demonstrated any error in the Panel's determination. Consequently, there is no basis for an order remanding the matter to OWA for a second Panel determination. Accordingly, the appeal should be denied.**

**IT IS THEREFORE ORDERED THAT:**

**(1) The Appeal filed in Worker Advocacy Case No. TIA-0110 be, and hereby is, denied.**

**(2) This is a final order of the Department of Energy.**

**George B. Breznay**
**Director**
**Office of Hearings and Appeals**

**Date:** September 20, 2004